CALCUTTA HIGH COURT

Abul Fata Mahomed Ishak

Vs

Rasamaya Dhur Chowdhuri

(Tottenham and Trevelyan, JJ.)

24.02.1891

JUDGMENT

Tottenham and Trevelyan, JJ.

1. The question which we have to decide in this appeal is whether a certain deed, dated the 21st December 1868, and purporting to be a wakfnamah, did create a valid wakf according to Mahomedan law.

2. The deed was executed by the defendants 1 and 2 in respect of all their immoveable property without particularising the various items of which that property consisted. They appointed themselves mutwalis, and for some years described themselves as such in collection papers and other documents connected with the management of property. But in 1874. they declared that they had revoked the wakf by reason of their necessities, and thenceforth they dealt with the property as if no wakf existed. The defendant No. 1, who had become much involved in debt, mortgaged and alienated numerous parcels of the property. This suit was instituted in 1888 by his sons as beneficiaries under the deed of wakf to have it declared that all the property was wakf, to recover from the transferees all the property alienated by their father, and to have him removed from the post of mutwali. The plaintiff No. 1 in his evidence before the lower Court stated that before instituting the suit he consulted various legal authorities in Calcutta, and ascertained from them that the wakf was valid according to Mahomedan law. The lower Court decided that it was so, and made a decree accordingly.

3. In the hearing of this appeal against that decree we have been assisted by learned Counsel on both sides, who have dealt with the case exhaustively from their respective points of view.

4. We would premise by saying that if the instrument in question did create a valid wakf when it was executed, no subsequent conduct of the wakfs could affect its validity; and unless from that conduct it can be inferred that they never intended to make a wakf at all, the consideration of it is not material to the question which we have to decide.

5. It is necessary next to state what the declared objects of the instrument were. In its opening sentences it states as follows: "For perpetuating the names of our fathers and forefathers and for protecting our properties, we...of our own free will and accord and without reluctance or compulsion make perpetual wakf of all our shares and rights in the immoveable properties pergunnahs, zemindaries, taluks, that are in our possession and enjoyment for the benefit of our children and grand-children and the members of our family from generation to generation and upon failure of them for the benefit of the poor and beggars and widows and orphans". And in a subsequent part of the deed it is stated that "the principal object of this wakf is that there be no loss to the properties; that the name and prestige of the family be maintained; and that the property be appropriated towards the maintenance of the name of the family and the support of the persons for whose benefit the wakf is made; and for acts of religion", etc. The appropriators make themselves the mutwalis for their lifetime, and provide that none of the beneficiaries shall be entitled to call for accounts from them or to sue them for increase of their allowances or for possession of any of the property.

6. From the passages above quoted it is quite clear that the purposes for which this wakf was made were, so to speak, secular rather than religious; and that it was intended to operate as a perpetual tying up of the properties for the sole benefit of the appropriators and their descendants for so long as any of them should exist in the world. The only definite religious or charitable object indicated is the support of the poor, the widows and orphans; and this object is contingent upon the total extinction of the appropriators' family in some future age.

7. Such being the character of the wakf, we have to decide whether it is one that is valid and irrevocable according to Mahomedan law.

8. The contentions of the parties are: (1) for the defendants appellants, that a wakf is not valid unless the property is dedicated solely, or, at least primarily and substantially, to religious or charitable objects; and (2) for the plaintiff's respondents, that a settlement upon the owner and his descendants for ever is a valid wakf if made in proper form, and if, as in the present case, there is an ultimate destination of the profits to the poor. Indeed, it is said on this side that even with its express mention of the poor a wakf for the benefit of the owner's descendants is valid. And the learned Advocate-General goes so far as to suggest that the intention of the Mahomedan law is that "wakf" should be a device to enable perpetual family settlements to be made under the veil of religious trusts.

9. Mr. Evans for the appellants relied on the following cases as authorities for the proposition that a wakf will not be recognized by the Court as valid, unless the property is substantially appropriated to religious or charitable purposes, Mahomed *Ashanulla Chowdhry v. Amarchand Kundu*[1] and *Mahomed Hamidulla Khan v. Lotful Huq*[2] *Abdul Ganne Kasam v. Hussen Miya Ruhmutula (10 Bom. 7); Fatima Bibee v. Ariff Ismailjee Bham*[3] This last case as, as regards the

point in question now, decided upon the authority of the second and third; and the second case proceeded to a great extent upon the authority of the third, viz., the case of Abdul Ganne Kasam v. Hussen Miya Ruhmutula 10 Bom. 7. In that case the Judges came to the conclusion that the balance of authority was strongly in favour of the view that to constitute a valid wakf there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes. They referred for support in this view to the Calcutta case of *Bibee Kuneez Fatima v. Bibee Saheba Jan*[4] and to Jewun *Doss Sahoo v. Shah Kabeerooddeen*[5]

10. On the other side, the learned Advocate-General contended that the decision in *Abdul Ganne Kasam v. Hussen Miya Ruhmutula*[6] *and Mahomed Hamidulla Khan v. Lotful Huq*[7] were erroneous; and he dismissed the Privy Council decision in *Mahomed Ashanulla Chowdhry v. Amarchand Kundu*[8] as not settling anything that is material to the case now before us.

11. It appears to us, however, that their Lordships in that case did say enough to negative the learned Advocate-General's rather bold proposition that the Mahomedan law intended to allow perpetual family settlements to be made under the veil of religious trusts. At any rate they expressly refused to countenance it in the case they were then deciding. And the judgment shows that they accepted as an undisputed proposition that to constitute a valid wakf in the case before them the property must be in substance given to charitable uses.

12. The learned Advocate-General contended that the decisions in Abdul Ganne *Kasam v. Hussen Miya Ruhmutula*[9] *and Mahomed Hamidulla Khan v. Lotful Huq*[10] were wrong upon the authority of Doe d. Jan Bibee v. Abdullah Barber 1 Fulton 345 a case tried in the Supreme Court of Calcutta before Ryan, C.J., and Grant, J. He also *relied upon Fatma Bibi v. The Advocate-General of Bombay*[11] *and Amrutlal Kalidas v. Shaik Hussein*[12]and upon the authorities cited by Mr. Ameer Ali in the Tagore Law Lectures for 1884, including Mr. Baillie.

13. The judgment of Ryan, C.J., based as it was upon the opinions of the Moulvies to whom the questions of Mahomedan law were referred, is certainly entitled to very great weight; but all that that judgment decides in respect of the validity of a wakf is that an endowment to charitable uses is valid, though qualified by a reservation of the rents and profits to the donor himself during his life; and that the donor may appoint himself mutwali and need not deliver possession to another. It does not declare that a wakf which on the face of it is not an endowment to religious or charitable uses is valid; and that is the question now before us. That judgment does show that the decisions in Abdul Gannr Kasam v. Hussen Miya Ruhmutula 10 Bom. 7(Supra) and Mahomed Hamidulla Khan v. Lotful Huq I.L.R. 6 Cal. 744(Supra) went too far in holding that, a valid wakf must from its creation be solely and exclusively for religious or charitable purposes; but it does not show that they were wrong in laying down that the primary and substantial objects must be of that nature. And in the case of Doe d. Jan Bibee v. Abdullah Barber the benefit to the religious purposes indicated in the deed were not wholly and indefinitely postponed to the interests of the donor and his descendants so long as any of the latter should continue to exist; but the reserve

was in favour of the donor himself and of certain persons only who were already in existence.

14. The other two cases relied upon by the Advocate-General Fatma Bibi v. The Advocate-General of Bombay I.L.R. 6 Bom. 42(Supra) and Amrutlal Kalidas v. Shaik Hussein I.L.R. 11 Bom. 492(Supra) are really in direct conflict with the decisions in Abdul Ganne Kasam v. Hussen Miya Ruhmutula 10 Bom. 7(Supra) and Mahomed Hamidulla Khan v. Lotful Huq I.L.R. 6 Cal. 744(Supra) cited by Mr. Evans; and we agree with him that they are irreconcilable with the latter.

15. The cases of Fatma Bibi v. The Advocate-General of Bombay I.L.R. 6 Bom. 42(Supra) and Amrutlal Kalidas v. Shaik Hussein I.L.R. 11 Bom. 492(Supra) seem to lay down practically that a perpetuity in favour of the donor and his descendants is a valid wakf, if an ultimate dedication be made in favor of some religious or charitable object upon the occurrence of a contingency, however remote and improbable. And we are not prepared to follow this ruling, unless we find it irresistibly supported by unquestionable authority. Baillie no doubt as well as the learned Tagore Law Lecturer of 1884 seem to favour this interpretation of the law; but the Hedaya, as translated by Hamilton, and most of the cases laid before us, seem to us to establish the fact that wakf must be in favour of a religious or charitable purpose, although there may be a temporary intermediate application of the whole or part of the benefits to the appropriator's family. All the cases that expressly sanction this latter arrangement were cases in which at least the ostensible and principal object of the wakf was religious or charitable. And that the dedication must not depend upon an uncertain contingency, such as the possible extinction of the family, has recently been well laid down by the Madras High *Court in Pathukutti v. Avathalakutti*[13]

16. We have the authority of the Privy Council in the case of *Mahomed Ashanulla Chowdry v. Amirchand Kundu*[14] cited by Mr. Evans for refusing to recognize as a valid deed of wakf an instrument which uses a particular form of words as a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

17. Precisely such, in our judgment, is the deed before us, and notwithstanding the fact that for a few years after its execution the owners of the property dealt with it nominally as mutwalis, it is certain that they had not really intended to give up their proprietary rights in it. And before very long they abandoned even the semblance of mere trusteeship. We cannot believe that the authors of Mahomedan law intended that, under cover of a pretended dedication to Almighty God, owners of property should be enabled to secure it for their own use, protect it for ever from their own and their descendants' creditors, and repudiate alienations in respect of which they have received full consideration. In our opinion, then, the deed before us cannot be sustained as a valid wakfnamah, and consequently we decree this appeal, reversing the decree of the Court below, and dismissing the plaintiffs' suit with costs of the other Courts.

Cases Referred.

1L.R. 171 A. 28 I.L.R. 17 Cal. 498
2I.L.R. 6 Cal 744
39 C.L.R. 66
48 W.R. 313
52 Moore's I.A. 390
610 Bom. 7
7I.L.R. 6 Cal. 744
8L.R. 17 I.A. 28; I.L.R. 17 Cal. 4 98
910 Bom. 7
10I.L.R. 6 Cal. 744
11I.L.R. 6 Bom. 42
12 I.L.R. 11 Bom. 492
13I.L.R. 13 Mad. 66
14L.R. 17 I.A. 28; I.L.R. 17 Cal. 498